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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 21

ESSEX RAZOR BLADE CORPORATION
Petitioner

vs.

GILLETTE SAFETY RAZOR COMPANY
Respondent

PETITIONER'S REPLY BRIEF.

RESPONDENT asserts that this is an "ordinary" patent case involving no important or novel question of law and no conflict of decisions upon the issue of validity, and that the only reason advanced for granting certiorari is that the decision of the court below is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit on the question of the scope of the Gaisman patent. But in the "ordinary" patent case there is no such conflict, and respondent does not deny that a conflict between two Courts of Appeals with respect to the scope of claims of a patent is a valid reason for granting certiorari, nor does it deny that conflict here. For petitioner does not deny that the blade held to be an infringement in the instant case is in all *substantial* respects the blade held *not* to be an infringement in the *Hawley* case. On this point respondent is content to say: "As can readily

be seen from an inspection of the drawings in the frontispiece of the petition, petitioner's blade is not identical with the Clark or Hawley blade" (Brief, p. 4). Perhaps, but what can *more* readily be seen from that frontispiece is that petitioner's blade and the Clark blade, if not "identical", at least resemble each other more closely than either resembles the Gaisman blade. Thus if petitioner's blade is "substantially a copy of the Gaisman blade"—as held by the Court of Appeals for the Third Circuit and stressed by respondent—then so is the Clark blade. Yet the Court of Appeals for the Second Circuit held otherwise. This is the conflict.

Respondent asserts that our petition "is in reality a request for an advisory opinion from this Court as to whether defendant would be free to make the Hawley blade not here involved" (Brief, p. 4). On the contrary the whole petition is predicated upon the assumption that neither petitioner nor anyone else is free to make the Clark or Hawley blade in the Third Circuit; that the Courts of Appeal for the Second and Third Circuits are in conflict on this very issue.

Respondent observes that the petition for certiorari discloses no ground for assailing the correctness of the decision of the Court of Appeals in the instant case. Neither does it attempt to justify the decision of the Court of Appeals for the Second Circuit in the *Hawley* case. We think respondent misconceives the function of a petition for certiorari. It is our view that where a conflict of decisions is advanced as the reason why certiorari should be granted, the function of the petition and accompanying brief is to show the existence of the conflict, not to assail the correctness of one decision—or to justify the other.

Respondent asserts that petitioner makes no attempt to establish that "clear error" which must be established before this Court will refuse to accept findings in which the two lower Federal Courts have concurred. But this

Court has held that the rule with respect to concurrent findings does not apply where, as here, there is a conflict of decisions between two Circuit Courts of Appeals. *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 36; *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177, 180; *Thomson Co.* v. *Ford Motors Co.,* 265 U. S. 445, 447.

Respectfully submitted,

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C. W. PALMER,
Counsel for Petitioner.

April, 1936.